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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 291

MINNESOTA MINING AND MANUFACTURING COMPANY,

Petitioner-Defendant,

v.

NEW JERSEY WOOD FINISHING COMPANY,

Respondent-Plaintiff.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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Introductory Comment

Just as the Third Circuit, while affirming, differed in rationale and, indeed, in result from the District Court, so now the Solicitor General, while urging the same result, disagrees with respondent's attempt to reconcile the divergent views of both courts below. We submit that, despite the uniformity in result achieved so far or desired for the future, this overall discord speaks eloquently to the point that it is fundamentally unwise, if not simply improper, to leave the relatively clear course charted years ago by Congress and navigated smoothly ever since by all involved in antitrust enforcement.

The principal quarrel among the courts below, our adversary and now the Solicitor General (whose brief was filed at the Court's invitation in the order granting

certiorari) turns upon (i) just how to rationalize an extension of Section 5(b) to encompass tolling during pendency of an FTC proceeding and (ii) whether Section 5(a) is or is not thereby affected. In this process virtually every other relevant policy consideration has been ignored as have "conventional" tools of statutory construction.

Roughly speaking, the District Court and the Solicitor General have adopted a policy approach to their respective interpretations of Section 5 as a whole. The District Court finds tolling for FTC proceedings justified on the ground that it would be "illogical" to hold otherwise and without reference to any impact on Section 5(a). The Solicitor General ascertains a paramount Congressional purpose which, though never articulated, should, as a matter of policy, now bring FTC proceedings within Section 5(b). He, however, affirmatively rejects—again as a matter of policy—any notion that FTC determinations are comprehended within the almost identical language of Section 5(a).

On the other hand, the Third Circuit and our adversary have chosen a highly legalistic approach which has led the Third Circuit to read FTC proceedings into Section 5 for *all* purposes although respondent apparently still shies from arguing that inclusion of FTC proceedings in Section 5(b) necessarily means qualifying FTC determinations as prima facie evidence under Section 5(a).

Our main brief dealt primarily with the variant decisions of the courts below and so much of respondent's present argument as was accepted at those levels. We therefore now deal primarily with the markedly different "views of the Government."

With Respect to the Government's Views . . .

The pervasive difficulty with the Government's position stems from, first, its unwillingness to accept Congress' choice of the adjective "civil" as defining the proceedings "by (or on behalf of) the United States" in both Sections 5(a) and 5(b) and, second, its insistence that, despite this identical language, §5(a) *excludes* but §5(b) *includes* FTC proceedings.*

From the Solicitor General's brief, we first cull the following:

> "It must be conceded, we think, that the words of Section 5(b) do not readily encompass the present case. No one would spontaneously describe an administrative proceeding upon a complaint issued by the Federal Trade Commission as a "civil or criminal proceeding • • • instituted by the United States" or—to use the original words of Section 5(b)—as a "suit or proceeding in equity or criminal prosecution." (Govt. Bf., pp. 14-15.)
>
> • • • • • •
>
> "We recognize, of course, that if Congress had plainly indicated a desire to distinguish between the judicial and administrative proceedings with respect to the tolling of the statute of limitations, its enactment would be conclusive no matter how inadequate the basis for the differentiation might seem." (*Id.*, 21.)
>
> • • • • • •
>
> "For the purposes of the present case we may assume that the court below erred in concluding that a Federal Trade Commission order is a 'final

* " 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'

'The question is,' said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master—that's all.' " (Lewis Carroll, *Through the Looking Glass*, Ch. VI.)

judgment or decree * * * rendered in any civil or criminal proceeding brought by or on behalf of the United States.'" (*Id.*, 32.)

* * * * *

"* * * Congress might well have concluded as a matter of substantive policy that it was unwise to give *prima facie* effect to an order made without regard to the rules of evidence in the comparatively free and untried administrative proceedings of the proposed new Federal Trade Commission. In this context there are important differences between judicial and administrative proceedings." (*Id.*, 34-35; Cf. 17.)

* * * * *

"* * * the real thrust of our argument is that the exact meaning of the phrase ['civil or criminal proceeding * * * by the United States'] need not be decided because the underlying policy is applicable to Federal Trade Commission proceedings whether the language covers them or not." (*Id.*, 35.)

These comments then lead the Solicitor General to incorporate in his conclusion the candid admission that the result below "is difficult *and perhaps impossible* to justify in terms of conventional analysis of the text and legislative history * * *" (*Id.*, 39-40; emphasis supplied.)

These concessions notwithstanding, this Court is nevertheless urged by the Government to approve the bald judicial legislation achieved below.* In short, the statute itself, the pertinent legislative history, judicial precedent and the understanding and acquiescence of Congress, the executive branch (and its agencies) and the bench, together with the private bar and its commentators, should now yield to "the Government's view" of the law as it might better have been.

In this sense the Government's brief is clearly misdirected: it would be more appropriately addressed to

* See *e.g.*, Note, 65 Colum. L. Rev. 158, 162 (1965).

Congress which, alone, is charged with the formulation of antitrust enforcement policies. See *U. S.* v. *Cooper Corp.*, Pet. Bf., p. 71: compare, as an endorsement of "strict construction" for antitrust enforcement statutes, *U. S.* v. *Boston & Maine Railroad*, —— U. S. ——, (No. 232; March 8, 1965).*

In its broader aspects the Government's brief precisely illustrates—and in striking detail—the very dangers to which we have alluded as being inherent in selective policy-making in the adversary context of a single case Pet. Bf., pp. 47-8, 67-71. The Solicitor General has chosen to single out as paramount just one of the several concurrent, complementary and even competing antitrust enforcement policies with which Congress has concerned itself over the years. While Congress might have chosen to enact, and the Executive to endorse, that policy without regard to others, the Solicitor General has pointed to no authority to indicate that Congress so chose and concedes the force of considerable authority to the contrary. Nor is there any representation that all concerned agencies of the government actually concur in the policy selected by the Solicitor General or feel that such a policy should be judicially, rather than legislatively, proclaimed.** Under

* Surely civil treble-damage litigation is as punitive in nature (if not more so) as a criminal prosecution under Section 10 of the Clayton Act.

** For instance, the 1964 Annual Report of the Federal Trade Commission at pp. 33-4 includes an express recommendation that Congress amend §5(a) to embrace FTC proceedings. (Oddly enough, no corresponding change is proposed in §5(b) to accord tolling to FTC proceedings; nor does the FTC propose to amend §5(a)'s *proviso*. If literally adopted, therefore, the FTC's consent orders, as well as those litigated, would become prima facie evidence but only in cases instituted within §4B's four-year period—unless a specific reference to FTC proceedings in §5(a) could then be construed to apply to §5(b) as well. In view of this tangle, we are fortunate to be called upon here only to meet the Solicitor General's legislative proposals and can leave the FTC's to Congress.)

the circumstances, one might fairly question the Solicitor General's approach to our time-honored tripartite division of governmental responsibilities.

However grave may be the overtones of the Solicitor General's remarkable divination—fifty years after the event—of the Congressional purposes in adopting Section 5 of the Clayton Act, the construction now urged "in the public interest" cannot withstand analysis in several obvious particulars:

(1)

At the outset we question the rather bland assumption that, from the standpoint of "fairness" to the defendant, suspending limitations pending FTC action is of little moment since the defendant has been timely charged and actively engaged in his defense. Govt. Bf., p. 19. Certainly several factors present in this case must be ignored before we can leap to the conclusion that the otherwise salutary policy of repose has been "outweighed."

Obviously, when a Clayton Act proceeding ends in divestiture, the defendant also divests himself, often irretrievably, of the very personnel, records and other evidence most essential to his defense. 3M was required to do this in 1960 to comply with the consent order. Secondly, he is now called upon to face a punitive treble-damage action rather than divestiture (with compensation) or an order to cease and desist from practices perhaps long abandoned. Finally, as this case neatly illustrates, he may also be called upon to defend a different substantive charge than that made by the FTC.* See Pet. Bf., Point III, pp. 71-78.

* New Jersey Wood's conversion of the FTC's Clayton Act case into Sherman Act theories also came too late to implicate Essex Wire in the IWI acquisition; hence 3M is now called to account for that acquisition while its putative co-conspirator and co-monopolist is excused.

It is therefore hard to see—at least in terms of "fairness"—how a defendant with his defensive capabilities seriously impaired and facing much more drastic sanctions with different substantive offenses charged (but in this case perhaps without recourse to its alleged joint tort-feasor) has not been injured.

(2)

Perhaps even more disturbing is the further assumption—implied in the stated assumption that Congress wanted plaintiffs to have the fruits of Governmental fact-finding resources—that the mere institution of an antitrust proceeding should automatically provide prospective plaintiffs with evidence of, or "leads" to, antitrust violations. It is at this point that the Solicitor General trips over his own analysis. Congress may, indeed, prefer a determination of liability in a single "major" proceeding instituted "by (or on behalf of) the United States." However, if the government fails to establish a violation, can it truly be said that Congress wished to provide random evidence (or "leads") to plaintiffs disgruntled at the government's failure with all of the attendant burdens thrown upon the courts? Such seems to be the Solicitor General's contention but, not only does it fly in the teeth of the legislative history (see pp. 11-13 *infra*), it pre-supposes an almost illicit purpose of fomenting private litigation in the wake of an abortive government case. Thus, unless we assume with the Solicitor General that every government complaint has intrinsic merit, the principal rationale of the policy argument is seriously undercut. Only a successful government litigation prosecuted to a final judgment or decree adduces prima facie evidence; those which fail therefore yield nothing except the evidence and "leads" which the Solicitor General now finds to be the "basic"

purpose in tolling the limitations otherwise applicable to private suits. Thus, not only is there no evidence of that "basic purpose," the purpose itself is inherently unfair to a successful defendant.

(3)

Indeed, if Congress intended that private plaintiffs could use a government suit to develop underlying evidence, witnesses, legal theories and otherwise receive the benefit of the "Government fact-finding resources", why stop short of the many investigative proceedings directed to establishing violations of "the antitrust laws" such as those conducted before the Grand Jury, or under a civil investigative demand, 15 U. S. C., §§1311-1314, or pursuant to Section 6(b) of the Federal Trade Commission Act, 15 U. S. C., §46(b)? Why should not Section 5(b) come into play during the antitrust inquiries of all the agencies listed in Section 11 of the Clayton Act and such other agencies that otherwise have—or might assume—an antitrust competence?

What, meanwhile, of the neglected plaintiff whose defendant has never been the subject of any governmental "proceeding" of any nature? Is it for his case alone that Congress enacted Section 4B? If so, surely the rule (policy of repose) has become the exception (policy of preservation) and the exception, the rule.

(4)

If FTC proceedings are still not to produce prima facie evidence, tolling during pendency of those proceedings may significantly affect the agency's consent order negotiations.

In short, if the law were as advocated by the Solicitor General, there would have been little inducement here for

3M (or for any future respondent) to settle with the FTC since a respondent with a tenable defense will feel no countervailing pull toward a consent settlement. Certainly, on the Solicitor General's reading, the declared Congressional policy in favor of encouraging consent settlements in antitrust cases would be seriously eroded.

(5)

In the final analysis, what the Solicitor General would attain by a tolling policy pronounced by this Court is probably now readily attainable in most cases prosecuted within the statutory limitations concurrently with related FTC proceedings. If the policy is to be public disclosure of the evidence and "leads" developed by the agency, tolling is surely an imprecise means to that end. Clearly, an extension of Section 5(b) such as sought (or, for that matter, even outright repeal of Section 4B) would not necessarily deliver to the putative plaintiff all which the Solicitor General envisions for him. Commission rules* and its practice** permit receipt of evidence *in camera* specifically so as to protect respondents—while still presumptively in a state of innocence—from unwarranted disclosures to competitors.

(6)

It is also asserted that distinguishing FTC proceedings and Justice Department cases for Section 5(b) purposes "would introduce" troublesome and capricious distinctions. Govt. Bf., p. 20. However, since precisely that distinction has been observed for fifty years, any trouble which now develops must be laid to those who would pre-

* See the Commission's Rules of Practice §§1.132, 1.133; *cf.* FTC Act. Sec. 6(f), 15 U. S. C., §46(f).

** See discussion at 3 CCH Trade Reg. Rep'r. §9637.

sently obliterate it. Nor, as we see it, does it help to classify plaintiffs who follow up on FTC proceedings as "losing rights" which those who follow the Attorney General have by virtue of Section 5(b). We can as fairly question whether such plaintiffs should acquire or *gain* "rights" from the courts which Congress has never declared.

(7)

It is even argued on the Government's behalf that tolling should be inferred and imposed (or, more precisely, limitations should be denied) independently of Section 5(b).

The authorities cited for this argument are simply inapposite. Here the principal reliance is upon a selective reading given this Court's decision of April 5 in the *Burnett* case, —— U. S. ——, No. 437. However, the Government ignores what is clearly the principal thrust of that decision where the plaintiff, asserting rights under the "humane and remedial" FELA Act, filed suit in a competent state court only to be dismissed for improper venue after the applicable statute had run. Thus the case was readily analogized to others in which "a plaintiff has not slept on his rights but, rather, has been prevented from asserting them." Opinion per Mr. Justice Goldberg.

Glus v. *Brooklyn Eastern Terminal,* 359 U. S. 231, also cited, does not really speak to tolling but to estopping a defendant who affirmatively misleads a plaintiff as to his rights from raising the statutory bar. Nor can New Jersey Wood claim to have been prevented from instituting its suit by war or any other circumstance beyond its control. Cf. *Hanger* v. *Abbott,* 6 Wall. 532.

These authorities are unavailing so far as New Jersey Wood is concerned. Not only did this plaintiff go to bed

and slumber peacefully on after full knowledge of the event which triggered the alleged damage (Amended Cmplt., Par. 11(b), R. 51a), but 3M's position materially changed as a direct consequence of the divestiture to which it consented.

(8)

Nor may it be validly concluded that Congress in 1914 acted either capriciously or was "mistaken" in its purposes or assumptions in failing—for no apparent or "plausible" reason according to the Government—"to add words more descriptive" of FTC proceedings to Section 5(b). Govt. Bf., p. 10. Indeed, Congress had several reasons to exclude FTC proceedings from tolling that are quite apparent and quite plausible: more pertinent, they are most compelling.

First, the inclusion of FTC proceedings within Section 5 in 1914 would have suspended limitations indefinitely whenever the FTC moved to enforce the Act since, until the 1959 Finality Act, FTC orders were always open to review at any time. Thus, since the time for appeal never ran, some rule different from that prevailing for court cases* would have had to be devised if tolling was itself ever to end.

Second, while Congress clearly intended treble-damage claimants to have the use of favorable judgments, it just as clearly did *not* intend that, regardless of the admissibility of the judgment, they should have the use of evidence and "leads" discovered by the Justice Depart-

* *Twentieth Century-Fox Film Corp.* v. *Brookside Theatre Corp.*, 194 F. 2d 846, 857-8 (8th Cir., 1952); *Electric Theatre Co.* v. *Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 944 (W.D. Mo., 1953).

ment, let alone the FTC, particularly when developed in unsuccessful prosecutions. See Pet. Bf., 63-5. Perhaps Congress *could* have adopted the latter policy and it may also be true that, when limitations are suspended for judicial proceedings, these broader benefits *might* become available to treble-damage claimants. But the Government's facile assumption that these incidental—and only occasional—consequences of the tolling provisions are themselves "the *basic* purpose of the tolling provision" (Bf., 18-19) is directly repudiated by the legislative history.

Had Congress truly desired "to give the private suitor the benefit of the government's fact-finding resources" (Govt. Bf., p. 19), the most direct way to accomplish this would be to open the files of the Justice Department (and the FTC, ICC, FRB, etc.) to prospective private suitors. However, an amendment to the Clayton Act doing just that was introduced and withdrawn under fire. This deliberate refusal by Congress to open the government's files was thereafter noted several times in debate. See Reynolds' brief, pp. 76, 79-80.

Finally, although the Government's suggestion (Bf., 23) that the language of §5(b) "was not chosen with a view to discriminating" between judicial suits and administrative proceedings "since the latter had not yet been authorized" may be arguably true in respect to the initial House draft,* it is demonstrably false as to the Senate committee's draft and every subsequent version. The Senate committee added the provision—now extant as

* The contention, however, does overlook the facts that the FTC Act creating the Trade Commission was under debate at the same time as the Clayton Act; that the ICC had been in existence since 1887; and that the Federal Reserve Board had existed since 1913. All three agencies were, of course, encompassed in what became Section 11 of the Clayton Act.

Section 11—giving enforcement powers to the FTC, the Interstate Commerce Commission and the Federal Reserve Board (and, eventually, to other administrative agencies). 15 U. S. C., §21. At the same time and with knowledge of that provision, the Senate committee, without amending the term "United States," did offer two changes in Section 5(b) which, by their acceptance, conclusively demonstrate that its language was deliberately designed to exclude any such administrative proceedings from the reach of the tolling provision.

First, the Senate committee inserted "any criminal prosecution" into the description of the proceedings which would toll limitations but carefully refrained from adding the newly authorized administrative proceedings. Second, the committee deliberately deleted from that description of those proceedings the words "on behalf of" thus limiting the tolling effect to proceedings brought "by the United States." See Pet. Bf., p. 18n. This change might well have been made because the committee feared the new FTC enforcement procedures might erroneously be deemed to be proceedings "on behalf of" the United States so as to toll the statute of limitations. See Reynolds' brief, 94-95. Significantly, the Government fails to suggest any other "plausible reason" for this change in language and, presumably for the lack of such a reason, omits this from the "significant changes" catalogued in its Brief, page 24, note 6.

With Respect to Respondent's Views . . .

(1)

New Jersey Wood also argues, like the Solicitor General, that the tolling provision of Section 5 is broader than the prima facie evidence provision and, hence, encompasses an

FTC proceeding. However, here principal reliance is upon *Union Carbide and Carbon Corp.*, v. *Nisley*, 300 F. 2d 561 (10th Cir., 1962), and the Senate report on the 1955 amendments to Section 5(b) rather than upon grounds of legislative policy. Resp. Bf., pp. 9-10."*

These authorities, however, contain nothing to support respondent's contention that an FTC proceeding can toll the statute of limitations. As we concede (Pet. Bf., pp. 65-7), Sections 5(a) and 5(b) may not be "co-extensive"; yet the variance in the statute's subsections cannot logically support New Jersey Wood's argument. Certainly the *Union Carbide* opinion in the very language respondent quotes (Bf., p. 11) expounds the converse of New Jersey Wood's proposition by accepting the traditional view that the "corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the *intended benefits* of related government proceedings" and then defining "intended benefits" as "making available to [private suitors] all matters previously *established* by the Government in antitrust actions." Since facts that provide the foundation for a "judgment or decree" are the only facts ever *established* in any suit, it is obvious that the Tenth Circuit considered that tolling was intended to provide time to await a "judgment or decree" in a judicial proceeding.

Sen. Rep. 619, on the other hand, simply sets forth the reason for adding a year following termination of a Government proceeding to the period of tolling and has nothing whatsoever to do with whether administrative proceedings can toll the statute.

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* New Jersey Wood's other effort in these pages (Bf., pp. 8-17) is to distinguish our contrary cases.

(2)

That what we have termed the "exclude/include" reading of identical words in Section 5 so wishfully sought by New Jersey Wood (and endorsed by the Solicitor General) lacks any foundation either in statutory language or legislative history is evident from the fact that neither New Jersey Wood nor the Solicitor General attempts to state when such a plastic concept became part of the Congressional purpose. We have had FTC Clayton Act proceedings since 1914 but, by avoiding any argument that such proceedings could toll before the Finality Act, New Jersey Wood tacitly concedes that, between 1914 and 1959, rights of private plaintiffs did depend on whether the Justice Department or the FTC commenced a proceeding. Respondent must likewise concede that, in all that time, no court held or implied that Section 5 was rendered unconstitutional by this disparity (Cf. Res. Bf., pp. 33-4).

New Jersey Wood quotes (Bf., p. 9) language from the Third Circuit opinion which may state an argument that an "exclude/include" construction became Congressional policy in 1955. Any argument based on the 1955 amendment, however, still faces the objection that FTC proceedings were not yet final; hence any tolling would be indefinite and for an indeterminable period, a "wholly artificial" result in the government's view (Bf., p. 33).

Such an argument must also acknowledge the fact that the only Congressional references to FTC proceedings during the years when the amendments adopted in 1955 were being debated indicated definitely that FTC proceedings were outside the scope of Section 5 and that no change was intended. See Pet. Bf., pp. 35-41. Congressman Celler later expressly agreed with a statement by the FTC's then Chairman that Section 5 is "never

applied in any event in a Federal Trade Commission case because the courts have held that our orders entered after full trial are not admissible."*

As for the 1959 Finality Act, neither New Jersey Wood nor the Solicitor General uses that amendment to Section 11 to support the "exclude/include" theory of construction they propose for Section 5. New Jersey Wood asserts that the attribute of finality, once provided, was sufficient to bring FTC proceedings and orders within both the prima facie evidence and the tolling provisions in line with the rationale of the original opinion in *Brunswick* (Resp. Bf., pp. 24-8); the Solicitor General, on the other hand, acknowledges that, in making FTC orders final, Congress did not make them "judgments or decrees" capable of constituting prima facie evidence and that the Third Circuit therefore erred in its contrary construction of Section 5(a). Govt. Bf., pp. 32-4.

Nor apparently does the Solicitor General find any indication in the legislative history of the Finality Act that FTC proceedings were intended to toll the statute of limitations. Legislative history preceding the Finality Act states as clearly as such chronicles ever do that the Act was intended to be merely procedural without making any substantive changes in law. See Pet. Bf., pp. 41-4.

With a theory of statutory construction lacking any support in the words of the statute or the Congressional

* *Hearings on Current Antitrust Problems Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 3 pt. 3, at p. 2355 (1955). Of course, so far as we know, Representative Celler has never been accused of being soft on antitrust enforcement. (Mr. Celler's comment, it is interesting to note, was, in turn, offered in agreement with the testimony of FTC Chairman Edward Howrey who, at the time, was accompanied by his executive director, Mr. Alex Akerman, whose brief *amicus* in this case takes just the opposite view from that of his Chairman in 1955.)

history, it is only candid to argue as respondent and the Solicitor General do that Section 5(b) is "readily severable" from Section 5(a) but that argument falls far short of proof that Congress, in fact, ever distinguished the two paragraphs of Section 5.

Congress, we submit, confined its innovations—and, hence, its discussions—to modifying traditional concepts of estoppel by authorizing the use of Government adjudications as prima facie evidence without mutuality. Tolling was simply a necessary concomitant—or "handmaiden"—if this extraordinary enforcement device was to enjoy full efficacy.

By Way of Addendum . . .

(1)

In Point II (Govt. Bf., pp. 36-39) the Solicitor General argues that New Jersey Wood's Sherman Act claims are based "in part" on "matters complained of" in the FTC's Clayton Act proceeding and that, therefore, limitations were suspended with respect to those claims as well. The Solicitor General considers that the tolling requirements were satisfied simply because both the Commission and New Jersey Wood "complained of" the raw fact of 3M's acquisition of IWI's assets. However, this ignores the practical fact that an antitrust defendant really faces two completely different law suits when the government and the private plaintiff found different "rights of action" on one raw fact. In this case, institution of the FTC proceeding put 3M on notice that proof would be required concerning the relevant market, market shares and other competitive factors customary in Clayton Act proceedings. On the other hand, only when New Jersey Wood tardily commenced its action more

than five years after the IWI acquisition could 3M fairly be said to know that it must marshall proof concerning meetings, conversations and other traditional indicia of Sherman Act conspiracies. Therefore, whatever may be said of the "fairness" to the defendant of tolling limitations during pendency of an FTC proceeding (Cf. pp. 6-7, *supra*) this Court should hold, with the authorities cited in Pet. Bf., pp. 72-74, that real prejudice arises when a defendant is not informed by pendency of the government proceeding of the "right of action" which a private plaintiff later seeks to maintain.

(2)

We also note that, since our main brief was prepared, there have been two additional District Court decisions respecting the ability or right of a private plaintiff to position a treble damage claim upon Section 7 of the Clayton Act. See Pet. Bf., pp. 75-6.

As matters now stand, *Bailey's Bakery* v. *Continental Baking Co.*, 235 F. Supp. 704 (D. Haw., 1964) is in alignment with *Gottesman* and *Highland Supply* in denying any such cause of action; 235 F. Supp. at 717. The unanimity of these cases is, however, somewhat counterbalanced by *Ames* v. *Bostich*, —— F. Supp. —— (S.D.N.Y., 1965; McLean, J.). That case, however, clearly errs in purporting to draw authority from the decisions below. This Court will, of course, appreciate the extent to which—and why—we have taken pains to preserve the point as an open question here.

CONCLUSION

We submit that a paramount policy of protecting delinquent plaintiffs beyond the express exception written into Section 5(b) by Congress a half-century ago has little warrant and may well operate to the impairment, if not exclusion, of the policies of encouraging government settlements, of forestalling supplemental litigation against exonerated defendants, of permitting Congress to establish the ground rules of antitrust enforcement and, of course, that of laying to rest after a prescribed period potential but dilatory claims.

Read as a whole, Section 5 of the Clayton Act clearly applies only to judicial actions by the Department of Justice. If the phrase "civil or criminal proceeding • • • by (or on behalf of) the United States" as employed in both §5(a) and §5(b) is to exclude FTC proceedings from §5(a) and include them within §5(b) it is for Congress and, with all respect, not this Court to declare it so.

The decisions below should be reversed with costs.

Respectfully submitted,

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